IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

C.W.P. No:844 of 2006

Judgment reserved on:14.12.2006

Date of decision: 28.12.2006

State of H.P. **Petitioner**

Versus

Des Raj **Respondent.**

Coram

The Hon'ble Mr. Justice Deepak Gupta, Judge.

The Hon'ble Mr.Surinder Singh, Judge.

Whether approved for reporting?[1]

For the Petitioner: **Mr.M.S.Chandel, Advocate General with Mr. R.M.Bisht, Deputy Advocate General.**

For the Respondent: **Mr.J.L.Bhardwaj,Advocate**

Deepak Gupta, J.

This petition by the State is directed against the order of the learned H.P.State Administrative Tribunal in O.A. No. 385 of 1991, decided on 18.8.2006.

This case has a rather chequered history. The respondent was appointed as a helper on daily waged basis on purely temporary basis in the mini workshop of GAD on 20th June, 1984. On 28.2.1986 he was appointed

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment?***

on ad hoc basis and the relevant portion of the appointment letter reads as follows:-

> "This is a purely stop gap arrangement and his services shall be terminated without assigning any reason thereof with one month's notice on either side."

Thereafter the services of the respondent were terminated on 29th December, 1987 by an order which on the face of it was an innocuous and non-stigmatic order. The respondent challenged the order of termination by filing an original application before the learned Administrative Tribunal in March, 1991. The original application was contested by the petitioner-State on various grounds including the ground that the application was delayed. The original application was allowed by the Bench of the learned Tribunal on 29th May, 2000. The State challenged this order before this court in CWP No. 919 of 2000. The writ petition was allowed by this court mainly on the ground that no application for condonation of delay had been filed by the employee and, therefore, the delay could not have been condoned. The order of the learned Tribunal was set aside and the matter was remanded to the learned Tribunal with direction to decide the matter afresh in

accordance with law. After the matter was sent back to the learned Tribunal, the employee filed an application for condonation of delay and the learned Tribunal vide its order dated 27th August, 2004 condoned the delay in filing the original application and held that the same was not barred by limitation. However, the learned Tribunal by treating the employee as a daily waged workman and following the judgment of this court rendered in H.P.Agro Industries Corporation Ltd. and Ors. Vs. Raj Kumar and another, 2002 (3) SLC 423 held that the Tribunal had no jurisdiction to entertain the original application and held that the remedy of the employee lay before some other forum. The employee filed review petition No.20 of 2004 on the ground that he was not a daily waged employee, but an ad hoc temporary employee and, therefore, the final portion of the order dated 27.8.2004 of the learned Tribunal may be reviewed. This review petition No. 20 of 2004 was allowed by the learned Tribunal on 30.6.2005 and the learned Tribunal came to the conclusion that the employee was not a daily waged employee and the matter was ordered to be re-heard. It would be pertinent to mention that no challenge has been made before us to

the aforesaid orders of the learned Tribunal condoning the delay and allowing the review petition.

Thereafter the original application was heard by the learned Tribunal. The learned Tribunal following a judgment of this court in Kuldip Singh Vs. State of H.P. and others 1988 (2) All India Service Law Journal 109 came to the conclusion that since the order of termination was based on an alleged act of negligence and gross misconduct on the part of the employee, the same was illegal since the order had been issued without any notice to him. The order was set aside and the employee was ordered to be reinstated in the same place and in the same job from where his services were terminated. The employee was also held entitled to all consequential benefits. The aforesaid order of the learned Tribunal is under challenge in the present writ petition.

As far as the validity of the order is concerned, it would be pertinent to mention that the order passed originally condoning the delay in filing the application as well as the order passed in the review petition have never been challenged and even in the present writ petition no challenge is laid to those orders. Therefore, the said orders have attained finality. The only question which

arises for consideration is whether the termination of services of the employee was proper or not.

No doubt, the employee was appointed on temporary basis, but on 28.2.1986 when his services were extended, it was clearly mentioned that his services are liable to be terminated with one months' notice on either side. No notice, as aforesaid, was given. Further, it is also apparent that the services of the employee were terminated on account of alleged misconduct on his part. Therefore, in our opinion, the learned Tribunal rightly held that the order terminating the services of the employee was illegal.

The main contention of the petitioner-State is that the learned Tribunal has gravely erred in ordering that the respondent-employee be granted all consequential benefits. It is contended that the services of the workman were terminated as far back as on 29th December, 1987. The employee has never worked during this entire period and there is no material to show that the employee was without job during this period and, therefore, it is contended that the employee is not entitled to back wages. On the other hand, Mr.J.L.Bhardwaj, learned counsel for the employee contends that since the

termination of the services of the employee is illegal, he is entitled to get entire back wages. Both the parties have cited a number of judgments on this aspect of the matter.

We find from the decisions of the Apex court rendered in 1970s and 1980s that reinstatement with consequential benefits of back wages was the norm in most case where the order of termination of services of the employee/workman was held to be illegal. There is no doubt that earlier the law was that in case the order of termination of an employee or a workman is set-aside then reinstatement with full back wages was the norm. The law has however been developing and keeping pace with the changing needs of the economy and industry. Now the decisions of the Apex Court have veered to the view that reinstatement with back wages is not the norm and that in appropriate cases compensation can be awarded in lieu of reinstatement.

In **Allahabad Jal Sansthan vs. Daya Shankar Rai and another, (2005) 5 SCC 124,** the Apex Court after considering the entire law on the subject held as follows:

> "16.We have referred to certain decision of this court to highlight that earlier in the event of an order of dismissal being set aside, reinstatement with full back

wages was the usual result. But now with the passage of time, it has come to be realized that industry is being compelled to pay the workman for a period during which he apparently contributed little or nothing at all, for a period that was spent unproductively, while the workman is being compelled to go back to a situation which prevailed many years ago when he was dismissed. It is necessary for us to develop a pragmatic approach to problems dogging industrial relations. However, no just solution can be offered but the golden mean may be arrived at."

In the aforesaid case the Apex court held that in view of the fact that the respondent has been reinstated in service and keeping in view the fact that the employee had not raised any plea or adduced any evidence to the effect that he remained unemployed, the interest of justice would be served if the employer is directed to pay 50% of the back wages.

Again in **General Manager, Haryana Roadways vs. Rudhan Singh, (2005) 5 SCC 591,** a three Judge Bench of the Apex Court held as follows:

"8.There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper

advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year."

In the aforesaid case the Apex Court while upholding the reinstatement set aside the award regarding payment of 50% back wages.

In **U.P. State Road Transport Corporation Ltd. Vs. Sarada Prasad Misra and another, (2006) 4 SCC 733**, the Apex Court held as follows:

> "13.But even otherwise, the award passed by the Labour Court as also the order of the High Court granting back wages deserves interference. In several cases, this Court has held that payment of back wages is a discretionary power which has to be exercised keeping in view the facts and circumstances of each case and neither straitjacket formula can be evolved, nor a rule of universal application can be adopted (vide P.G.I. of Medical Education & Research v. Raj Kumar; Hindustan Motors Ltd. V. Tapan Kumar Bhattacharya). In Kendriya Vidyalaya Sangathan v. S.C. Sharma this Court held that when question of determination of entitlement of back wages comes up for consideration, prima facie, it is for the employee to prove that he had not been gainfully employed. Initial burden is on the employee to show that he remained without any employment. In several cases, similar view has been taken by this Court in recent years. In M.P. SEB v. Jarina Bee it was observed that reinstatement in service and payment of back wages are two different things and payment of back wages is not a natural consequence of setting aside an order of dismissal. In Allahabad Jal Sansthan v. Daya Shankar Rai, it was indicated that the law is not in absolute terms that in all cases of illegal termination of services, a workman must be

paid full back wages. In Haryana State Coop. Land Development Bank v. Neelam it was stated that the aim and object of the Industrial Disputes Act is to impart social justice to the workman but keeping in view his conduct. Payment of back wages, therefore, would not be automatic on entitlement of the relief of reinstatement. In G.M., Haryana Roadways v. Rudhan Singh the Court reiterated that there is no rule of thumb that in each and every case, where the Industrial Tribunal records a finding that the order of termination of service was illegal that an employee is entitled to full back wages. A host of factors which are relevant, must be taken into account."

In this case the Apex Court held that the ends of justice would be met in case the workman is held entitled to 50% of the back wages till his reinstatement into service.

The Apex Court in **Municipal Council, Sujanpur vs. Surinder Kumar, (2006) 5 SCC 173,** held as follows:

"13.Equally well settled is the principle that the burden of proof, having regard to the principles analogous to Section 106 of the Evidence Act that he was not gainfully employed, was on the workman.

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15.Apart from the aforementioned error of law, in our considered opinion, the Labour Court and consequently the High Court completely misdirected themselves insofar as they failed to take into consideration that relief to be granted in terms of Section 11-A of the said Act being discretionary in nature, the Labour Court was required to consider the facts of each case therefor. Only because relief by way of reinstatement with full back wages would be lawful, it would not mean that the same would be granted automatically.

16.For the said purpose, the nature of the appointment, the purpose for which such appointment had been made, the duration/tenure of work, the question whether the post was a sanctioned one, being relevant facts, must be taken into consideration."

The Apex Court in (2006) 7 SCC 180 U.P.S.R.T.C. Vs. Mitthu Singh has again held as follows:-

"12. Since limited notice was issued with regard to payment of back wages, we do not enter into the larger question whether the action of terminating the services of the respondent was legal, proper and in consonance with law. But we are fully satisfied that in the facts and circumstances of the case, back wages should not have been awarded to the respondent workman. In several cases, this Court has held that payment of back wages is a

discretionary power which has to be exercised by a court/tribunal keeping in view the facts in their entirety and neither straitjacket formula can be evolved nor a rule of universal application can be laid down in such cases."

From the reading of the aforesaid judgments, it is clear that the Apex court has now clearly laid down that reinstatement and back wages do not automatically follow the setting aside of the order of termination. Each case has to be decided on its own facts. The Apex Court in some cases has neither granted reinstatement nor back wages even though the order of termination has been found to be illegal and has compensated the employee by giving him lumpsum compensation. In other cases reinstatement has been allowed, sometimes without backwages and in some cases with 50% back wages.

In the present case the termination of the services of the employee took place on 29.12.1987. He approached the learned Tribunal only in March, 1991. No doubt, the delay has been condoned, but he cannot be given benefit for his own delay. There is also no adequate material on record to show whether the employee during this period was employed or not. Therefore, following the aforesaid judgments of the Apex Court, we are of the view

that in the present case the relief which can be granted to the workman is that he should be reinstated in service in the same job from where his services were terminated. As ordered by the learned Tribunal, the petitioner-State, if so advised, may hold inquiry with regard to the alleged misconduct in accordance with law. As far as consequential benefits are concerned, we hold that the petitioner shall only be entitled to 50% of back wages from Ist April, 1991 till his reinstatement.

The petition is allowed to the extent mentioned above and disposed of accordingly. No costs.

(Deepak Gupta),J.

December 28, 2006(K) (Surinder Singh),J.